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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
NORTH BRANCH ENERGY PARTNERS, L.P. and
MON VALLEY ENERGY CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, the Federal Energy Regulatory Commission ("FERC") has promulgated rules governing the rates to be set by state public utility commissions for purchases of electricity by utilities from the developers of "qualifying facilities." PURPA and the FERC rules require that those rates be "just and reasonable" to a utility's customers, and not greater than a utility's "avoided costs." The rules also encourage freely negotiated purchase agreements between public utilities and private developers. In this case, the Pennsylvania Public Utility Commission and reviewing courts have exercised presumed plenary power under PURPA to modify the terms of a negotiated agreement, and have granted a $1 billion windfall to a developer by purporting to calculate the utility's avoided costs as of the date of a voluntary agreement executed in 1987, when that agreement would have lapsed but for modifications imposed by the Commission in 1989. The questions presented are:

1. Whether state commissions have been granted broad powers under PURPA to modify the terms of privately negotiated purchase agreements, and to excuse developers from meeting their contractual obligations to a utility, when those obligations were designed to protect the utility's customers from unreasonable and excessive rates; and

2. Whether state commissions, in determining the date on which a utility's avoided costs are to be calculated under PURPA, may decide that the relevant "legally enforceable obligation" to deliver power existed as of the date of an executed voluntary agreement, even though that agreement later is substantially modified over the utility's objection, and even though the use of the earlier date results in rates that exceed the utility's avoided costs and that no longer are "just and reasonable" to the utility's customers.

LIST OF PARTIES AND RULE 29.1 LIST

All parties to the proceedings in the Commonwealth Court of Pennsylvania, and all parties before this Court, are listed in the caption of this Petition.

Petitioner West Penn Power Company is a wholly owned subsidiary of Allegheny Power System, Inc. West Penn has two subsidiaries that are not wholly owned by it: Allegheny Generating Company and Allegheny Pittsburgh Coal Company.

Petitioner Armco Advanced Materials Company is a wholly owned subsidiary of Armco, Inc. It has no subsidiaries that are not wholly owned.

Petitioner Allegheny Ludlum Corporation has neither a parent company nor subsidiaries that are not wholly owned.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners West Penn Power Company, Armco Advanced Materials Company and Allegheny Ludlum Corporation respectfully pray that a writ of certiorari issue to review the judgment of the Commonwealth Court of Pennsylvania entered in this matter on July 15, 1993.

OPINIONS BELOW

The unreported orders of the Pennsylvania Supreme Court, entered on April 4, 1994, denying petitions for allowance of appeal filed by all petitioners from the opinion and order of the Commonwealth Court, are reprinted in Appendices A and B, at 1a-6a. The opinion and order of the Commonwealth Court, filed on July 15, 1993, are reported at 157 Pa. Commw. Ct. 150, 629 A.2d 221, and

are reprinted in Appendix C, at 7a-22a. Applications for reargument were dismissed and denied in unreported orders of the Commonwealth Court reprinted in Appendices D and E, at 23a-24a.

This Petition concerns the Burgettstown cogeneration project, proposed to be developed by respondent North Branch Energy Partners, L.P. ("North Branch"). The proceedings before the Pennsylvania Public Utility Commission ("PUC") and reviewing courts concerning this project have been closely related to the proceedings involving the Milesburg project and Shannopin project, both of which are now pending before this Court on petitions for writ of certiorari. *See West Penn Power Co., et al.* v. *Pennsylvania Public Utility Commission, et al.*, No. 93-1341 (filed Feb. 22, 1994) ("Milesburg"); *West Penn Power Co., et al.* v. *Pennsylvania Public Utility Commission, et al.*, No. 93-1535 (filed Mar. 29, 1994) ("Shannopin"). The prior opinions and orders of the PUC and the Pennsylvania courts involving the Burgettstown project are described herein.

The proceedings commenced with a tentative opinion and order of the PUC, dated July 8, 1988, reported at 67 Pa. P.U.C. 656 and reprinted in Appendix H, at 47a-96a, which approved a proposed electric energy purchase agreement (the "Agreement"), between petitioner West Penn Power Company ("West Penn") and North Branch. After the Pennsylvania Commonwealth Court decided in the Milesburg case that PUC approval of such agreements required a trial-type hearing, the PUC consolidated the North Branch proceedings with those involving several other power purchase agreements between West Penn and developers of proposed "PURPA projects." The consolidation orders are reported at 68 Pa. P.U.C. 183 and 69 Pa. P.U.C. 124, and are reprinted in Appendix I, at 97a-104a, and Appendix J, at 105a-115a.

The unreported recommended decision of the Administrative Law Judge ("ALJ"), following the consolidated hearing, and Appendix A to that recommended decision

(which excerpted a portion of West Penn's brief relating to the Burgettstown Agreement), are reprinted in Appendix K, at 116a-219a, and Appendix L, at 220a-225a. With respect to the Burgettstown Agreement, the ALJ recommended that North Branch's petition to modify the Agreement to extend contractual milestone dates should be denied. At a public meeting on September 21, 1989, the PUC rejected that aspect of the recommended decision. The unreported motion, and the dissenting and concurring statements of the Commissioners, are reprinted in Appendix M, at 226a-238a. The formal order of the PUC approving the Burgettstown Agreement, and granting the requested contract modifications, was entered on September 29, 1989, and is reported at 71 Pa. P.U.C. 60, 106 P.U.R. 4th 459. It is reprinted in Appendix N, at 239a-289a. A separate dissenting opinion is reported at 110 P.U.R. 4th 37, and is reprinted in Appendix O, at 290a-294a. On October 27, 1989, the PUC denied a petition to reconsider the contract modifications to the Burgettstown Agreement. That unreported order is reprinted in Appendix P, at 295a-298a.

Appeals from the PUC's orders approving three of the PURPA projects seeking to sell electricity to West Penn were argued before the Pennsylvania Commonwealth Court on April 4, 1990. That Court issued opinions in the Shannopin and Milesburg cases on July 17, 1990, but held its decision in Burgettstown until September 7, 1990. The unreported opinion and orders of the Commonwealth Court, affirming in part and reversing in part the PUC's Burgettstown order, are reprinted in Appendix Q, at 299a-320a. Although the Supreme Court of Pennsylvania granted petitions for allowance of appeal in the Milesburg case, it denied related petitions filed in the Burgettstown case, on November 19, 1991. The unreported order of the Court is reprinted in Appendix R, at 321a. Applications for reconsideration filed by West Penn and the PUC were denied in an unreported order dated February 3, 1992, reprinted in Appendix S, at 322a.

Following the Pennsylvania Supreme Court's refusal to entertain the Burgettstown appeal, North Branch requested the PUC to recalculate the capacity rates called for under the Agreement, consistent with the Commonwealth Court's opinion and orders of September 7, 1990. On July 6, 1992, the PUC entered an order describing the proceedings to be conducted on remand. That order is reported at 76 Pa. P.U.C. 552, and is reprinted in Appendix G, at 39a-46a. On November 24, 1992, the PUC entered an unreported opinion and order, reprinted in Appendix F, at 25a-38a, which set new capacity rates under the Burgettstown Agreement, and terminated the proceedings. The Commonwealth Court affirmed the PUC's rate order on July 15, 1993, and the Pennsylvania Supreme Court denied further review, in the opinions and orders described above. *See* App. A-E.

JURISDICTION

The judgment of the Pennsylvania Commonwealth Court was entered on July 15, 1993. App. C. The Pennsylvania Supreme Court denied petitioners' discretionary petitions for allowance of appeal in orders entered on April 4, 1994. App. A & B. This Petition is filed within ninety days of the entry of those orders, and is timely pursuant to Supreme Court Rule 13.1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTES AND REGULATIONS INVOLVED

This case involves legal issues arising under section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, and the rules promulgated thereunder by the Federal Energy Regulatory Commission ("FERC"), particularly those set forth at 18 C.F.R. §§ 292.301 and 292.304 (1993). Those provisions of federal law are reprinted in Appendices T and U respectively, at 323a-335a. The PUC also has adopted rules implementing PURPA, as required by the federal statute.

The pertinent provisions of those rules, 52 Pa. Code § 57.32 (1983), are set forth in Appendix V, at 336a-337a.

STATEMENT OF THE CASE

A. Introduction.

This case is closely related to the Petitions now pending before this Court in Milesburg (No. 93-1341) and Shannopin (No. 93-1535). All three Petitions should be considered together on certiorari, and consolidated for plenary review by this Court. With respect to the Milesburg Petition, this Court entered an Order dated May 23, 1994, inviting the Solicitor General to file a brief expressing the views of the United States. That brief has not yet been filed. In Shannopin, on June 13, 1994, this Court entered an Order granting motions by two amici curiae to file briefs in support of the Petition for Certiorari. The arguments presented by the amici in Shannopin, and the anticipated arguments to be made by the Solicitor General in Milesburg, will be pertinent to this Court's consideration of the questions presented in this Petition.

As with Milesburg and Shannopin, this Petition involves the interplay of § 210 of PURPA, 16 U.S.C. § 824a-3, and implementing regulations promulgated by FERC that require utilities to purchase electric energy from qualifying facilities at not more than the utilities' avoided costs for such purchases,[1] and the FERC rules which encourage utilities and the developers of qualifying facilities to negotiate freely for contractual terms and conditions different from those imposed by statutory mandate. *See* 18 C.F.R. § 292.301(b).

In this case, West Penn entered into a voluntary agreement for the purchase of energy and capacity from North

[1] A utility's "avoided costs" is the amount it would have charged its customers for power supplied by the utility itself, either from generation or wholesale purchase, but which will be supplied instead by the qualifying facility. *See* 16 U.S.C. § 824a-3(d); 18 C.F.R. § 292.101(b)(6).

Branch's proposed Burgettstown cogeneration facility at rates that were slightly less than West Penn's avoided costs, calculated as of a date in October, 1986, when the parties negotiated their agreement. The Burgettstown Agreement, which was executed on October 15, 1987, also called for North Branch to meet certain milestones toward the completion of the project on fixed dates; upon failure of the developer to meet those milestones for any reason the Agreement was to terminate, relieving the parties of further obligations.

Pursuant to the express terms of the Agreement, West Penn filed a petition with the PUC seeking approval of the rates established by the parties, so that West Penn would be assured of recovering from its customers the charges it agreed to pay to North Branch. When the proceedings before the PUC became protracted, North Branch moved for the PUC to modify the Agreement, principally to change the milestone dates and to excuse its inability to adhere to those milestones. The PUC, over West Penn's objection, granted those requested modifications to the contract in an order entered on September 29, 1989. Thereafter, West Penn and its largest customers, petitioners Armco Advanced Materials Company and Allegheny Ludlum Corporation ("Armco and Allegheny"), have consistently contended that the PUC's entry of those contract modifications was impermissible under PURPA, in part because the PUC refused even to consider whether the capacity rates negotiated by West Penn in October, 1986 remained less than its avoided capacity costs as of the date of the PUC's September, 1989 order.

The Pennsylvania Commonwealth Court has held that although the PUC did *not* have the authority under state law to modify the parties' contract, § 210 of PURPA granted the PUC that authority *under federal law*. The Commonwealth Court also has rejected the petitioners' contention that § 210 of PURPA requires that the capacity rates established by the modified contract must be not greater than West Penn's avoided capacity costs as of

the date of the PUC's modification order. The Pennsylvania Supreme Court has denied discretionary review of these important issues of federal law.

In its most recent order in the Burgettstown proceedings, the PUC established a rate order governing the capacity payments that West Penn will be required to make to North Branch (and that West Penn's customers will be required to absorb), over the 33 year term of the modified contract. The total capacity charges established by the PUC with respect to the Burgettstown project alone amount to approximately $1 billion. This rate order has been entered in spite of West Penn's consistent testimony and argument that as of September, 1989 it clearly had *no need* for the additional base load capacity sought to be supplied by the Burgettstown project. Appeals from the PUC's rate order to the Commonwealth Court and the Pennsylvania Supreme Court have been exhausted.

The outcome in Burgettstown also preordains the rate orders that the PUC will enter in the Milesburg and Shannopin cases. Thus, unless this Court grants the pending petitions for certiorari, West Penn's customers will be saddled with massive rate increases from these three proposed PURPA projects, reflecting rates that are far in excess of West Penn's avoided costs, for the purchase of base load capacity that West Penn does not need to serve its customers. This incongruous result has been founded on the Pennsylvania PUC's and Commonwealth Court's fundamental misinterpretations of what § 210 of PURPA requires.

Petitioners will further describe herein the proceedings in the PUC and Pennsylvania courts involving the Burgettstown project. The related proceedings concerning the Milesburg and Shannopin projects are described in greater detail in the Petitions filed in Nos. 93-1341 and 93-1535.

B. Burgettstown I.

West Penn entered into an Agreement with North Branch on October 15, 1987, which called for West Penn to purchase all energy and capacity produced by the

Burgettstown project over a 33 year term, then expected to commence on or after September 30, 1991. App. H, at 49a. The project was a proposed 80 megawatt bituminous coal waste-fired cogeneration power plant to be located in Washington County, Pennsylvania, approximately nine miles from Burgettstown. *Id.* at 48a; App. K, at 137a. The purchase price for the electricity to be produced by this power plant included both an "energy cost," which was a variable rate based on West Penn's "avoided energy cost rate" as defined in the Agreement; and a "capacity cost" to be paid at a fixed rate of 3.6¢ per kilowatt hour,[2] which was "slightly lower than West Penn's estimate of its levelized present value of avoided capacity over the life of the Project *as of October 6, 1986*." App. K, at 138a (emphasis supplied).

The Agreement contained a variety of terms designed to protect the interests of West Penn and its customers in the Burgettstown project; to ensure that West Penn would be able to recover in rates paid by its customers the payments it would make to North Branch; and to require that the project would proceed toward completion in a timely fashion. Among those provisions were a series of "milestone dates" designed to ensure that the Burgettstown power plant was placed in service not later than October 1, 1993.[3] The first critical milestone created by the Agreement was the requirement that North Branch close on its financing for the construction of the project by not later than October 1, 1989. *See* App. K, at 208a. Absent a closing on or before that date, "for any reason whatsoever, including Force Majeure" the Agreement was to "automatically terminate without further liability of either

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[2] The issues presented in this Petition have involved the propriety of the capacity rate only, and whether it is not greater than West Penn's avoided capacity costs, as required by § 210 of PURPA and the FERC rules. "Energy costs" are variable costs associated with the generation of electricity, principally the cost of fuel. "Capacity costs" are costs associated with providing the capability to generate and deliver electricity, principally the capital costs of facilities. *See* App. Q, at 301a.

[3] As of this date, the project has neither been financed nor built.

party to the other." Burgettstown Agreement, § 10.2(c); *see* App. L, at 222a. This fundamental protection was negotiated for the benefit of West Penn's customers. *Id.*, at 220a-221a.

On January 5, 1988, West Penn initiated proceedings before the PUC seeking approval of rate recovery for the charges it would pay under the Burgettstown Agreement. App. H, at 47a-48a. In its Tentative Opinion and Order entered on July 8, 1988, the PUC approved the rates established by the Burgettstown and Shannopin Agreements over the objections of petitioners Armco and Allegheny, and the Pennsylvania Office of Consumer Advocate. *Id.* at 95a. Exceptions were filed by various parties, and in the meantime the Pennsylvania Commonwealth Court, in the Milesburg proceedings, determined that in order to ensure due process for ratepayers a PUC order approving rate recovery for a PURPA project required notice to the utility's customers and a trial-type hearing. *See Barasch* v. *Pennsylvania Public Utility Comm'n*, 119 Pa. Commw. Ct. 81, 546 A.2d 1296, *modified*, 119 Pa. Commw. Ct. 115, 550 A.2d 257 (1988), *appeal denied*, 523 Pa. 652, 567 A.2d 655 (1989).[4]

In an Order entered on September 30, 1988, the PUC decided to adhere to the procedural requirements imposed by the Commonwealth Court in the *Barasch* decision, and it consolidated the proceedings in Burgettstown, Shannopin and another project for the purpose of a hearing before an Administrative Law Judge ("ALJ"). *See* App. I. In a subsequent Order, dated January 19, 1989, after remand of the Milesburg case to the PUC, those proceedings also were consolidated with the other West Penn agreements awaiting hearing by the ALJ. *See* App. J.

In April, 1989 the ALJ conducted eight days of hearings in the consolidated proceedings. At the outset, North Branch filed a petition requesting the PUC to modify its

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[4] The Pennsylvania courts, PUC, and the parties in the proceedings below typically have referred to the *Barasch* due process decision as "Milesburg I." It is reprinted as Appendix E to the Petition for Writ of Certiorari filed in No. 93-1341.

Agreement with West Penn in several respects. North Branch asked that its financing closing date be extended from October 1, 1989 to a date six months following the PUC's final order approving the Agreement, that all other milestone dates be adjusted accordingly, and that its capacity credit should be increased as a result of the fact that the delays caused by the hearing would result in the Burgettstown project actually coming "on line" at an anticipated date nearer to the date in 1995 when West Penn had estimated a need for additional capacity. *See* App. K, at 129a.

The ALJ's Recommended Decision addressed two "phases" of the consolidated proceedings. In "Phase I," the ALJ addressed the question whether the rates established by West Penn's PURPA agreements ought to be approved. In "Phase II," the ALJ addressed the petitions to modify the milestone dates and other contract terms that had been filed by North Branch and by the developer of the Milesburg project. With respect to the Milesburg Agreement, which already had terminated because of the developer's failure to meet an extended financing closing date, the ALJ determined that any effort to "modify" such a lapsed contract would be futile under state law, and could not be entertained. *See* App. K, at 202a-208a. As for Burgettstown, the ALJ determined that North Branch's requested modifications to the Agreement also should be denied because of the significant planning uncertainties that would result to West Penn if the milestone dates were set at indefinite periods following the entry of a final PUC order. The ALJ also determined that when the parties had negotiated their Agreement, North Branch had freely accepted the risks of its inability to close on financing due to regulatory delay. *Id.* at 214a-215a. The ALJ concluded:

> If the developers are permitted to modify the negotiated [agreements] here because of unforeseen events, the contracts between [West Penn] and the cogenerators become meaningless. Such a decision will lead to a reluctance of utilities to negotiate such contracts in the future. . . . *Id.* at 216a.

The ALJ also recommended that North Branch's request to increase the agreed capacity rate be denied. *Id.* at 215a.

On September 21, 1989, the PUC held a public meeting during which the majority determined to adopt the ALJ's recommended decisions on the "Phase I" issues, but to reverse as to the Milesburg and North Branch petitions to modify their Agreements. Two commissioners voted to modify the contracts under applicable state law, § 508 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 508, one commissioner dissented, and the fourth filed a concurring statement expressing his "considerable reluctance" to grant the contract modifications because "[i]n essence we are abrogating bona fide contracts that were willingly entered into by all parties." *See* App. M, at 237a.

The PUC's formal orders with respect to the West Penn PURPA agreements were entered on September 29, 1989. With respect to the Burgettstown "Phase II" issues, the PUC first noted that North Branch had withdrawn its request for an increase to the 3.6¢ per kilowatt hour capacity charge called for by the Agreement. But the PUC granted North Branch's request for an extension of its financing and related milestone dates, and a related motion to stay the effect of the financing closing date.[5] The PUC held that it had the authority to modify the Agreement under a provision of state law granting the PUC the power to modify utility contracts on public interest grounds, reasoning that "it is essential that regulatory delay . . . be recognized," and that intervention in contested PURPA proceedings by a utility's customers should

[5] North Branch filed its application to stay the financing closing date on August 21, 1989. The PUC granted the stay in recognition of the fact that under § 508 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 508, a PUC order modifying a contractual provision does not take effect until thirty days after it is entered. *See* App. N, at 276a. Absent a stay, therefore, the Burgettstown Agreement would have lapsed on October 1, 1989, two days following the PUC's Order granting the requested modification of the milestone dates.

not be permitted to defeat the developer's expectation of completing a negotiated contract in a timely fashion. App. N, at 275a. The PUC also rejected West Penn's arguments that modifications of the agreed contract terms would disrupt the utility's orderly capacity planning function. *Id.*

Commissioner Fischl filed a formal dissenting opinion from the PUC's Orders, issued on October 6, 1989. He described the majority's resolution of "the so-called Phase II issues" as "novel and erroneous," and inconsistent with the PUC's own rules, promulgated pursuant to PURPA, which stated that " 'nothing in this subchapter will affect existing contracts or future contracts freely entered into by utilities and qualifying facilties.' " App. O, at 291a (quoting 52 Pa. Code § 57.32, reprinted in App. V). Commissioner Fischl also stated that § 508 of the Public Utility Code, relied upon by the majority to modify the Burgettstown Agreement, was inapplicable, both because North Branch could not meet the "public interest" standard established by the statute, and because the requested modifications could not go into effect until 30 days after the PUC's order, by which time the Agreement would have terminated due to North Branch's failure to meet the financing milestone. *Id.* at 293a. Commissioner Fischl concluded that the majority had significantly altered the bargaining power between developers and utilities, which had been carefully balanced under PURPA, the FERC rules, and the PUC's own regulations, and "swung the pendulum too far toward the developers and away from the ratepayers who are the final guarantor of the payments and terms approved here." *Id.* at 294a.

On October 13, 1989, petitioners Armco and Allegheny sought reconsideration by the PUC of its order staying the effect of the October 1, 1989 financing milestone date in the Burgettstown Agreement, arguing that the PUC had no power under state law to issue such a stay, and that the contract modification therefore was invalid. The PUC entered an Order on October 27, 1989,

denying the petition on the express basis that even if it were true that the PUC had no power under state law to modify the parties' Agreement, it had the authority to enforce § 210 of PURPA by requiring West Penn to accept the extensions of the contractual milestone dates requested by North Branch. *See* App. P, at 297a.

West Penn and Armco and Allegheny both appealed from the PUC's Burgettstown order to the Commonwealth Court. A central issue posed by those appeals was whether the PUC, acting pursuant to § 508 of the state Public Utility Code, could modify what had been a voluntary agreement between a utility and a PURPA developer, without following the dictates of § 210 of PURPA and the FERC rules. Petitioners argued that § 508 was preempted to the extent it otherwise would be applicable to voluntary agreements executed pursuant to PURPA, because neither the federal statute nor the FERC rules had delegated to state commissions the power to modify, reform, or revise negotiated agreements between utilities and the developers of qualifying facilities. Petitioners also argued that the PUC's forced modifications to the Burgettstown Agreement constituted, in effect, an order for West Penn to purchase power pursuant to a commission-mandated contract. Yet the PUC had taken no steps, as required by the FERC rules, 18 C.F.R. § 292.304(d), to determine West Penn's avoided costs as of the date that this new legally enforceable obligation to deliver power was incurred. The petitioners also argued, based on record evidence presented to the ALJ, that West Penn's avoided costs had fallen significantly since October, 1986, and that the practical effect of the PUC's order was to require West Penn to purchase capacity that it no longer needed, at rates far in excess of its avoided costs, all in violation of § 210 of PURPA and § 292.304(d) of the FERC rules.

By the time the Commonwealth Court decided the appeals from the PUC's order in Burgettstown, that Court already had issued its published opinion affirming "Phase

II" of the PUC's order in Milesburg. *See Armco Advanced Materials Corp.* v. *Pennsylvania Public Utility Comm'n*, 135 Pa. Commw. Ct. 15, 579 A.2d 1337 (1990), *aff'd*, —— Pa. ——, 634 A.2d 207 (1993), *cert. pending*, No. 93-1341 (filed Feb. 22, 1994).[6] With respect to the "Phase I" issues, the Commonwealth Court reversed the PUC's order in Burgettstown, as it had previously done in Milesburg and Shannopin, to the extent that the PUC had approved the capacity rates called for by West Penn's agreements based on a determination that those rates were not in excess of West Penn's avoided capacity costs as of dates in 1986 when the payment terms had been negotiated. The Court held instead that the FERC rules required that for a long-term contract, the rates had to be set at levels not greater than the utility's avoided costs as of the date of delivery, or at the time the developer incurred a "legally enforceable obligation" for the delivery of energy or capacity. *See* 18 C.F.R. § 292.304(d)(2). The Court ruled that a "legally enforceable obligation" to deliver capacity was not incurred by North Branch until its Agreement with West Penn was executed. The PUC's previous interpretation of PURPA, that rates should be based on the utility's avoided costs as of the time of "serious negotiations," was inconsistent with the FERC rules and had to be abandoned. *See* App. Q, at 306a-307a.

With respect to the "Phase II" issues in Burgettstown, involving the legality of the PUC's order modifying the agreed milestone dates over West Penn's objection, the Commonwealth Court affirmed. The Court first rejected West Penn's preemption argument, holding that where a utility submits a contract to a state commission for rate

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[6] The Commonwealth Court has referred to that decision as "Milesburg II," distinguishing it from its earlier decision in "Milesburg I," which had required notice to customers and a trial-type hearing for PUC approval of PURPA contracts. The "Milesburg II" opinion is reprinted as Appendix B to the Petition for Writ of Certiorari filed in No. 93-1341.

aproval, PURPA authorizes and requires the commission to modify any terms of that contract that the commission finds to be inconsistent with the federal statute or implementing regulations, independent of state law. App. Q, at 310a. The Court thus side-stepped all of West Penn's challenges to the PUC's use of § 508 of the Public Utility Code to modify the Burgettstown Agreement, on the basis that it was PURPA that had supplied the PUC's sole authority for its order.[7] And in "Milesburg II," the Commonwealth Court already had held that the PUC had the authority under § 210 of PURPA to order West Penn to enter into a new contract with a developer after an old agreement had lapsed, and to include in that new contract pricing terms that were indentical to the old agreement. *Id.* at 311a. The Court reasoned as follows:

> We held [in *Milesburg II*] that the power the PUC was exercising was its power under section 210 of PURPA, rather than any authority under state law. That holding applies to the Commission's action in regard to the North Branch [Agreement] as well. Although the PUC did not at first correctly articulate the authority for its action, its order denying the petition for reconsideration remedied that problem. The PUC was not exercising state authority pursuant to section 508 of the Public Utility Code when it extended the milestone dates in the North Branch [Agreement]. Accordingly, there is no reason for this court to consider the constitutionality of section 508. *Id.*

In its unpublished Burgettstown opinion, the Commonwealth Court never expressly reached the additional arguments raised by petitioners that § 210 of PURPA and the

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[7] The Court observed that while the PUC had cited as authority only § 508 in its order of September 29, 1989, in its subsequent order denying reconsideration it had relied on § 210 of PURPA as an alternative basis for its authority to modify the Burgettstown Agreement. App. Q, at 311a.

FERC rules required the PUC to determine the capacity rates to be paid by West Penn based on an avoided cost determination as of the date of the PUC's September 29, 1989 order modifying the Agreement, although the same Court had rejected those arguments in its Milesburg II opinion. *See* 579 A.2d at 1347-49.

West Penn and Armco and Allegheny filed petitions for allowance of appeal with the Pennsylvania Supreme Court, expressly contending that the Commonwealth Court had obliterated the distinction recognized in the FERC rules between privately negotiated PURPA contracts and commission mandates to purchase power from a PURPA developer; and had failed to require the PUC to engage in a comparison between the contract rates and West Penn's avoided costs as of the date of the PUC order mandating a modification of the parties' Agreement. The PUC cross-appealed on the issue whether the Commonwealth Court had correctly ruled that its "time of serious negotiations" standard for determining avoided capacity costs was inconsistent with PURPA and the FERC rules. The Pennsylvania Supreme Court, on November 19, 1991, denied the petitions. *See* App. R. West Penn and the PUC filed applications for reconsideration, seeking to have Burgettstown decided along with the Milesburg appeal, as to which the Court, on November 19, 1991, had granted review. Those applications were denied on February 3, 1992. *See* App. S.

C. Burgettstown II.

While the petitions for allowance of appeal were pending before the Pennsylvania Supreme Court, North Branch moved for the PUC to implement the Commonwealth Court's remand order. *See* App. G, at 41a-42a. In response, West Penn asserted that further evidentiary hearings were required in order for the PUC to determine West Penn's avoided capacity costs as of the contract execution date in October 1987, since the prior

hearing before the ALJ had been conducted assuming that the appropriate date for determination of those costs was October, 1986.[8] The PUC entered an Order on July 6, 1992, denying West Penn's request for an evidentiary hearing as inconsistent with the mandate of the Commonwealth Court. App. G, at 44a. The PUC ordered instead that North Branch, West Penn, and any other interested parties submit proposed recalculations of the capacity credits payable to North Branch under the modified Agreement, utilizing avoided cost inputs as of October 15, 1987, and assuming a range of potential in-service dates for the Burgettstown project between July 1, 1994 and October 1, 1995. *Id.* at 45a-46a.

After that process was completed, the PUC entered an Opinion and Order dated November 24, 1992, accepting North Branch's recalculations, which produced capacity rates ranging from 4.9¢ per kilowatt hour to 5.7¢ per kilowatt hour depending on the in-service date for its power plant. The PUC's Order reiterated that the October 15, 1987 Agreement between West Penn and North Branch would otherwise remain in effect, with the milestone dates adjusted in accordance with the PUC's prior modification order. *See* App. F, at 37a-38a. In adopting North Branch's calculations, the PUC rejected West Penn's proffered evidence that even as early as October 15, 1987, it had no need for the base load capacity sought to be avoided by the Burgettstown project. *Id.* at 28a-29a. With this rate order in place, the PUC terminated the Burgettstown proceedings. *Id.* at 38a.

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[8] The October, 1987 date was mandated as the appropriate date for the PUC's avoided capacity cost determination by the Commonwealth Court. The petitioners preserved their argument, then pending before the Pennsylvania Supreme Court in the Milesburg appeal, that § 210 of PURPA and the FERC rules mandated the PUC to use the date of its September, 1989 modification order as the appropriate date for the new avoided cost calculation to be performed in Burgettstown.

Petitioners once again appealed to the Commonwealth Court. The focus of the appeals in "Burgettstown II" was the failure of the PUC to accept West Penn's evidence that even by October 15, 1987, the utility's long range planning had changed such that it did not have a need for the additional base load capacity that the Burgettstown project was meant to supply.

The Commonwealth Court affirmed the PUC's rate order on the basis that the evidence relied upon by West Penn to calculate its avoided costs as of October 15, 1987 was based on "hindsight," rather than "on factors *known as of the date the legally enforceable obligation was incurred*." App. C at 15a (emphasis in original) (footnote omitted). This was the standard that had been adopted by the Commonwealth Court in an opinion entered in the Shannopin proceedings, referred to by the Court as "Shannopin III." *See West Penn Power Co.* v. *Pennsylvania Public Utility Comm'n*, 154 Pa. Commw. Ct. 136, 623 A.2d 383, 387 (1993).[9] The Court also relied on its earlier decisions in the Shannopin case, presently pending before this Court in No. 93-1535, for the proposition that "[a]t least as to [qualifying facilities], time was frozen when the [Agreement] became effective, and all calculations had to be made as of that date." *Id.* at 16a.

The Commonwealth Court also stated that West Penn had recognized in its presentation to the Court that to accept its position on the need for a new hearing as to its avoided capacity costs as of October 15, 1987, the Court would have to adopt the views of the three dissenting judges in the "Shannopin II" decision, who "would have allowed a change in capacity need based on [information developed in 'hindsight'] in fairness to the ratepayers who would be saddled with paying for the excess power as opposed to the utility that signed the agree-

[9] This opinion is reprinted as Appendix W to the Petition for Writ of Certiorari filed in No. 93-1535.

ment." *Id.* at 16a, n.12. The Court declined to revisit the soundness of its 4 to 3 decision in "Shannopin II." [10] In fact, the Court expressly stated that PURPA requires the result that "when the PUC approves an [Agreement] between a [qualifying facility] and a utility, the risk of excess capacity is shifted to the ratepayers who are required to pay for it even if it later is determined it is not needed." *Id.* at 18a, n.14.

Thus, the Commonwealth Court affirmed the PUC's rate order accepting North Branch's recalculations of West Penn's avoided capacity costs, and denying West Penn's efforts to present evidence to show that even as of October 15, 1987, the Burgettstown capacity was not needed. *Id.* at 19a-21a. Applications for reargument before the Commonwealth Court were dismissed and denied. *See* App. D & E. On April 4, 1994, the Pennsylvania Supreme Court denied petitions for allowance of appeal. *See* App. A & B.

REASONS FOR GRANTING THE WRIT

When Congress enacted PURPA in 1978 its stated objectives were: "to encourage—(1) conservation of energy supplied by electric utilities; (2) the optimization of the efficiency of use of facilities and resources by electric utilities; and (3) equitable rates to electric consumers." PURPA § 101, 16 U.S.C. § 2611. *See also FERC* v. *Mississippi,* 456 U.S. 742, 746 (1982). To encourage that rates to consumers of electricity would be "equitable," Congress mandated in § 210(b) of PURPA that the rules promulgated by FERC "shall insure that, in requiring any electric utility to offer to purchase electric energy from

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[10] The so-called "Shannopin II" decision is reported as *West Penn Power Co.* v. *Pennsylvania Public Utility Comm'n,* 150 Pa. Commw. Ct. 349, 615 A.2d 951 (1992), *appeal denied,* —— Pa. ——, 637 A.2d 291 (1993), *cert. pending,* No. 93-1535. It is reprinted as Appendix C to the Petition for Writ of Certiorari filed in No. 93-1535.

any qualifying cogeneration facility or qualifying small power production facility, the rates for such purchase . . . shall be just and reasonable to the electric consumers of the electric utility and in the public interest. . . ." 16 U.S.C. § 824a-3(b). Section 210(b) also provides that no FERC rule "shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." *Id.*

The FERC rules adhere to those statutory requirements. Nonetheless, in applying those rules in these cases, the PUC and the Pennsylvania courts have completely lost sight of the statutory mandate that all rates passed on to consumers for power sold to utilities under PURPA must be "just and reasonable," and that no rate may exceed a utility's avoided costs. Instead, the Commonwealth Court has adopted the view that PURPA mandates that once a utility enters into a contract with a qualifying facility, the PUC is free to modify that contract in any manner to ensure that the facility is built. Thereafter, the utility's consumers bear the risk that the modified contract will call for the payment of capacity rates in excess of avoided costs, or even for capacity that is not needed at all. *See* App. C, at 18a, n.14.

The legislative history of PURPA § 210, as well as the words of the statute, conclusively demonstrate that this is not what Congress had in mind when the statute was enacted. The Conference Committee stated that qualifying cogenerators and small power producers were not to be guaranteed a rate of return on their investment and that their "risk in proceeding forward . . . is not guaranteed to be recoverable." Moreover, the Committee advised that the provisions of PURPA "are not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers." H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 97-98 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7831-32.

The proceedings in this case, and in the Milesburg and Shannopin cases, reflect a policy by the Pennsylvania PUC to ensure that the developers of qualifying facilities always recover their costs of going forward, that they obtain rates for their power that ensure profits, that any risks they undertake through voluntary agreements with the purchasing utilities eventually may be avoided, and that the consumers of electricity in Pennsylvania must assume those risks and subsidize the developers. And in asserting that PURPA *requires* such results, the PUC and the Commonwealth Court have run roughshod over specific FERC rules designed to create a role for voluntary agreements between PURPA developers and purchasing utilities, while also disregarding the principles of equitable rates and avoided cost pricing mandated for implementation by Congress.

The important issues of federal law raised in this Petition are variations on the questions presented in Nos. 93-1341 and 93-1535. Petitioners adopt herein all the arguments warranting review that were presented in those Petitions, and direct the Court's attention to specific reasons further favoring this Court's exercise of its discretion to review these decisions on the merits.

I. THE PUC AND THE PENNSYLVANIA COURTS HAVE MISCONSTRUED THE PURPA REGULATIONS, AND DEVIATED FROM FEDERAL POLICY, BY EQUATING THE SUBMISSION TO THE PUC OF A NEGOTIATED AGREEMENT FOR RATE APPROVAL WITH A PETITION FOR THE PUC TO ORDER A UTILITY TO ENTER INTO A CONTRACT WITH A QUALIFYING FACILITY.

The FERC regulations create an important role for the private negotiation of "PURPA contracts" between utilities and the developers of qualifying facilities. Section 292.301(b) of the FERC Rules states:

> Nothing in this subpart:
>
> (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or
>
> (2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

In implementing the requirements of PURPA, the Pennsylvania PUC also adopted rules exempting negotiated contracts from the regulatory scheme. *See* 52 Pa. Code § 57.32(c) (1983), reprinted in App. V.[11]

In *American Paper Institute* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402 (1983), this Court also recognized the key role that private contracts play under the regulatory scheme implemented by FERC, observing that "it may often be in the interest of a qualifying facility to negotiate a long-term contract at a lower rate [than the full-avoided-cost rate otherwise applicable under the FERC rules]. The [FERC's] rule simply establishes the rate that applies in the absence of a waiver or a specific contractual agreement." 461 U.S. at 416.

In this case, the PUC and the Pennsylvania courts have eviscerated the federal policy favoring free negotiation of long-term contracts between utilities and qualifying facilities by permitting a qualifying facility to modify its contractual obligation to comply with important milestone

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[11] The PUC's regulations not only track the language of § 292.301(b), but also add a requirement that "[e]ach utility shall file with the Commission a copy of any contract or agreement that it enters into with a qualifying facility with a design capacity of 500 kilowatts or more." *Id.* § 57.32(c)(2). The state regulations also promised that "nothing in this subchapter will affect existing contracts or future contracts freely entered into by utilities and qualifying facilities," and that "[l]ong term contracts are encouraged." *Id.* § 57.32(a).

dates and to extend those milestones for years, while nonetheless retaining a purported federal statutory right to compel the utility to abide for all time with the pricing terms of the contract. Moreover, the utility is compelled to adhere to a pricing structure tied to its avoided costs as of the date the contract was executed, even though by the time the contract was modified by PUC mandate, the utility's avoided capacity costs had been greatly reduced and it no longer had a need for the power the PUC required it to purchase. Under the principles adopted in this case, any incentive for a utility even to attempt to protect its customers from excessive rates by negotiating for project milestone dates and automatic termination provisions has been destroyed. *See* App. K, at 216a (ALJ recommended decision); App. O, at 294a (dissenting opinion of Commissioner Fischl) ("This decision has eliminated the need for negotiated contracts[;] [d]evelopers can simply dictate terms and have the Commission order the utility to execute the appropriate contract.").

As petitioners have demonstrated previously, courts of last resort from other states have correctly interpreted the FERC rules, and maintained the distinction between negotiated contracts and commission orders to purchase power. *See, e.g., Public Utility Comm'n* v. *Gulf States Utilities Co.*, 809 S.W.2d 201 (Tex. 1991); *In re Vicon Recovery Systems*, 153 Vt. 539, 572 A.2d 1355 (1990); *Water Power Co.* v. *PacifiCorp*, 99 Or. App. 125, 781 P.2d 860 (1989), *review denied*, 309 Or. 291, 787 P.2d 887, *cert. denied*, 498 U.S. 811 (1990); *Bates Fabrics Inc.* v. *Public Utilities Comm'n*, 447 A.2d 1211 (Me. 1982).[12] Each of these state court decisions adopted as a controlling legal principle the notion that PURPA and the FERC rules carve out an area for the private negotiation of con-

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[12] These decisions are discussed at length in the Milesburg Petition, No. 93-1341, at 20-23, and in the Shannopin Petition, No. 93-1535, at 22-23.

tracts, the terms of which are binding on qualifying facilities. In *Gulf States* and *Vicon,* in particular, the state commissions were asked to approve the terms of such negotiated agreements. The Supreme Courts of Texas and Vermont did not adopt the rationale applied by the Pennsylvania Commonwealth Court in all of the pending cases—that a contractual provision calling for advance rate approval of a private contract gives a state commission a license under PURPA to "reform" the contract by modifying or invalidating the significant terms to which the qualifying facility had agreed. Indeed, those courts explicitly rejected the notion that PURPA and the FERC regulations mandate commission oversight of negotiated contracts.

The Pennsylvania PUC and reviewing courts have misinterpreted federal law by: (1) dissolving the distinction between freely negotiated agreements and federally mandated orders to purchase, a distinction clearly drawn in the FERC rules; (2) allowing qualifying facilities to avoid their contractual obligations designed to protect a utility and its customers from excessive rates; and (3) granting the PUC a broad mandate to "reform" negotiated contracts by rewriting them to comply with a misguided notion of what federal PURPA policy requires. The clear conflict over this question among state courts of last resort, and the absence of any other forum for the resolution of this important issue of federal law,[13] warrants plenary review by this Court.

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[13] Section 210(g)(1) of PURPA, 16 U.S.C. § 824a-3(g)(1), allows federal judicial review of proceedings conducted by state regulatory authorities under PURPA only to the extent that such review may be obtained under 16 U.S.C. § 2633. The latter provision deprives federal courts, *except this Court,* of jurisdiction over actions arising under subchapters I and II of PURPA, with limited exceptions designed to enforce certain procedural rights. Thus, for all practical purposes, this Court is the only federal court that may take appellate jurisdiction over the important questions of federal law decided by state commissions purporting to act under PURPA.

II. IN MISINTERPRETING THE CIRCUMSTANCES UNDER WHICH A QUALIFYING FACILITY HAS A LEGALLY ENFORCEABLE OBLIGATION TO DELIVER ELECTRIC ENERGY TO A UTILITY, THE PUC AND PENNSYLVANIA COURTS HAVE FAILED TO ABIDE BY PURPA'S REQUIREMENTS THAT THE RATES FOR PURCHASES OF POWER MANDATED BY THE STATUTE "SHALL BE JUST AND REASONABLE TO THE . . . CONSUMERS OF THE ELECTRIC UTILITY" AND NOT GREATER THAN THE UTILITY'S "INCREMENTAL COST."

Although Congress intended by enacting PURPA to create conditions in which cogenerators and small power producers could more readily sell electricity to utilities, the statute expressly provides that a utility's ratepayers are not required to subsidize those sales. *See* pages 19-20, *supra*. The FERC rules mirror the statutory requirements, repeating the commands that rates shall "[b]e just and reasonable to the electric consumer," and that the rules do not require "any electric utility to pay more than the avoided costs for purchases." 18 C.F.R. § 292.304(a).[14] In *American Paper Institute*, this Court upheld the FERC rules that had set the purchase rate for energy supplied by qualifying facilities at the statutory maximum, as a reasonable reconciliation of Congress' goals of encouraging cogeneration and small power production, while not penalizing the interests of consumers. *See* 461 U.S. at 412-18.

The mechanics of the rate setting rules adopted by FERC are tied to the timing of the qualifying facility's actual delivery of energy to the purchasing utility or the existence of a "legally enforceable obligation" to deliver. 18 C.F.R. § 292.304(d). For a developer such as North

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[14] The rules make clear that "avoided costs" and the "incremental cost . . . of alternative electric energy" described in PURPA § 210(b) are equivalent. 18 C.F.R. § 292.101(b)(6); *see American Paper Institute, supra*, 461 U.S. at 406.

Branch that chooses to sell both energy and capacity to a utility over a specified term, the rules provide:

> [T]he rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) *The avoided costs calculated at the time the obligation is incurred.*

18 C.F.R. § 292.304(d)(2) (emphasis added).

In the Burgettstown Agreement, and in all proceedings before the PUC and Pennsylvania courts, North Branch has chosen to have its capacity rates calculated based on West Penn's avoided costs "at the time the obligation is incurred." But the critical question of federal law presented by the PUC's order modifying the contract, and the Commonwealth Court's September 7, 1990 decision affirming that order, is *when* the obligation was incurred. If the PUC and Commonwealth Court had determined that North Branch's legally enforceable obligation to deliver energy and capacity to West Penn was incurred as of the date of the PUC's modification order in September, 1989, rather than the date of the original contract in October, 1987, West Penn's avoided costs over the term of the mandated contract would be calculated at approximately $1 billion less than what the PUC's most recent order has required.[15] The PUC's decision to require West Penn to adhere to a modified contract, using the same capacity rates as those set in the original Agreement, therefore created a billion dollar windfall for North Branch, and

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[15] This calculation is based on the difference between a capacity cost rate of zero, as asserted by West Penn during the proceedings below, and the final rate order entered by the PUC, which accepted North Branch's recalculated capacity rates varying from 4.9¢ per kilowatt hour ($967 million) to 5.7¢ per kilowatt hour ($1.12 billion) over the 33 year term of the modified Agreement.

will result in rates that are neither "just and reasonable" to West Penn's customers, nor less than West Penn's "incremental cost," as § 210(b) of PURPA requires. The decisions of the PUC and the Commonwealth Court have given no weight at all to these fundamental statutory requirements.

One distinction between the Burgettstown and Shannopin cases and the decisions entered in the Milesburg proceedings is the sheer magnitude of the rate increase faced by West Penn's customers as a result of the PUC's refusal to calculate West Penn's avoided capacity costs as of the date of the PUC's orders modifying or abrogating its PURPA agreements. Another distinction is that in Burgettstown, unlike Milesburg and Shannopin, the Pennsylvania courts have now affirmed what the PUC has characterized as a final rate order. Although the state court judgments in all three cases are "final" for purposes of 28 U.S.C. § 1257 with respect to the questions of federal law they present, the respondents in this case will be unable to contend that the capacity rates for the Burgettstown project have not yet been determined by the PUC and approved by the courts, or that the question of the legality of those rates under PURPA is somehow premature.[16] This Petition represents the last opportunity for any court to rule on the question whether PURPA requires the contract modifications mandated for the Burgettstown Agreement by the PUC and the Commonwealth Court. And, insofar as Burgettstown is concerned, this is the last opportunity for any court to review the question whether PURPA permits the PUC to impose capacity rates on a utility and its customers based on a "legally enforceable obligation" derived from the execution date of a contract that lapsed by its own terms

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[16] The "finality" issue has been addressed by petitioners in their Reply Memorandum in Milesburg, No. 93-1341, at 1-3, and in their Petition in Shannopin, No. 93-1535, at 17-18, n.9, and in their Reply Memorandum at 5-6.

(Milesburg) or that would have lapsed but for modifications imposed by the PUC over the utility's objections (Shannopin and Burgettstown).

As petitioners have argued previously, in similar circumstances other courts have properly taken § 210(b) of PURPA into account. For example, in *Vicon, supra*, the Vermont Supreme Court adopted the view that where a privately negotiated agreement was conditioned on approval by the state's Public Service Board, the qualifying facility had no "legally enforceable obligation" to deliver power until that approval had been obtained. *See* 572 A.2d at 1360. This interpretation of the parties' agreement, informed by PURPA and the FERC rules, allowed the Public Service Board to judge the reasonableness of the rates under current economic conditions, rather than the conditions prevailing when the contract was executed four years earlier, and to determine correctly that the rates no longer were "just and reasonable." *Id.*

There is a conflict currently raging in the state courts over the extent to which PURPA permits or requires state commissions to take "changed circumstances" into account. *See* Shannopin Petition, No. 93-1535, at 27-29 & n.14; *see also* Brief of Amicus Curiae Edison Electric Institute, No. 93-1535, at 3, nn.2&3 & 10-11. But no state other than Pennsylvania has adopted the extreme and misguided interpretations of PURPA evidenced by the decisions in these cases. The PUC not only has failed to make adjustments for changes in a utility's capacity needs once a long-term PURPA contract has been executed, but also has refused to recognize the need to re-evaluate avoided costs as of the date of a new "legally enforceable obligation" in circumstances where a proposed contract has lapsed, or would have terminated absent commission-imposed modifications, due to the developer's failure to abide by the contract terms.

Because of the peculiar jurisdictional provisions of PURPA, *see* note 13 *supra*, where state tribunals are principally responsible for implementing federal law, this

Court's guidance is required to resolve these important and recurring questions of statutory interpretation.[17] This Court should accept plenary review of this case, and the Petitions in Nos. 93-1341 and 93-1535, to reconcile the conflicting approaches of the state courts to the question of what constitutes a "legally enforceable obligation" under the FERC rules, and how those rules should be interpreted consistent with the statutory commands that rates shall be "just and reasonable," and shall not exceed "incremental costs."

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[17] At one time FERC had issued a Notice of Proposed Rulemaking on the Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities, which might have clarified its rules in this area. 53 Fed. Reg. 9,331-34 (Mar. 22, 1988). For example, an amendment to 18 C.F.R. § 292.304 contained in the proposed rules would have added a new subsection (g), expressly providing that a state commission "should consider redetermining the electric utility's avoided capacity cost rate" in the event that "the amount of capacity offered by qualifying facilities exceeds an electric utility's capacity needs." 53 Fed. Reg. at 9,333. FERC has not acted on this proposed rulemaking. Related notices of proposed rulemaking under PURPA were terminated by FERC in an order issued on September 29, 1993. *See* 58 Fed. Reg. 51,777, 51,778 & n.1 (Oct. 5, 1993).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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